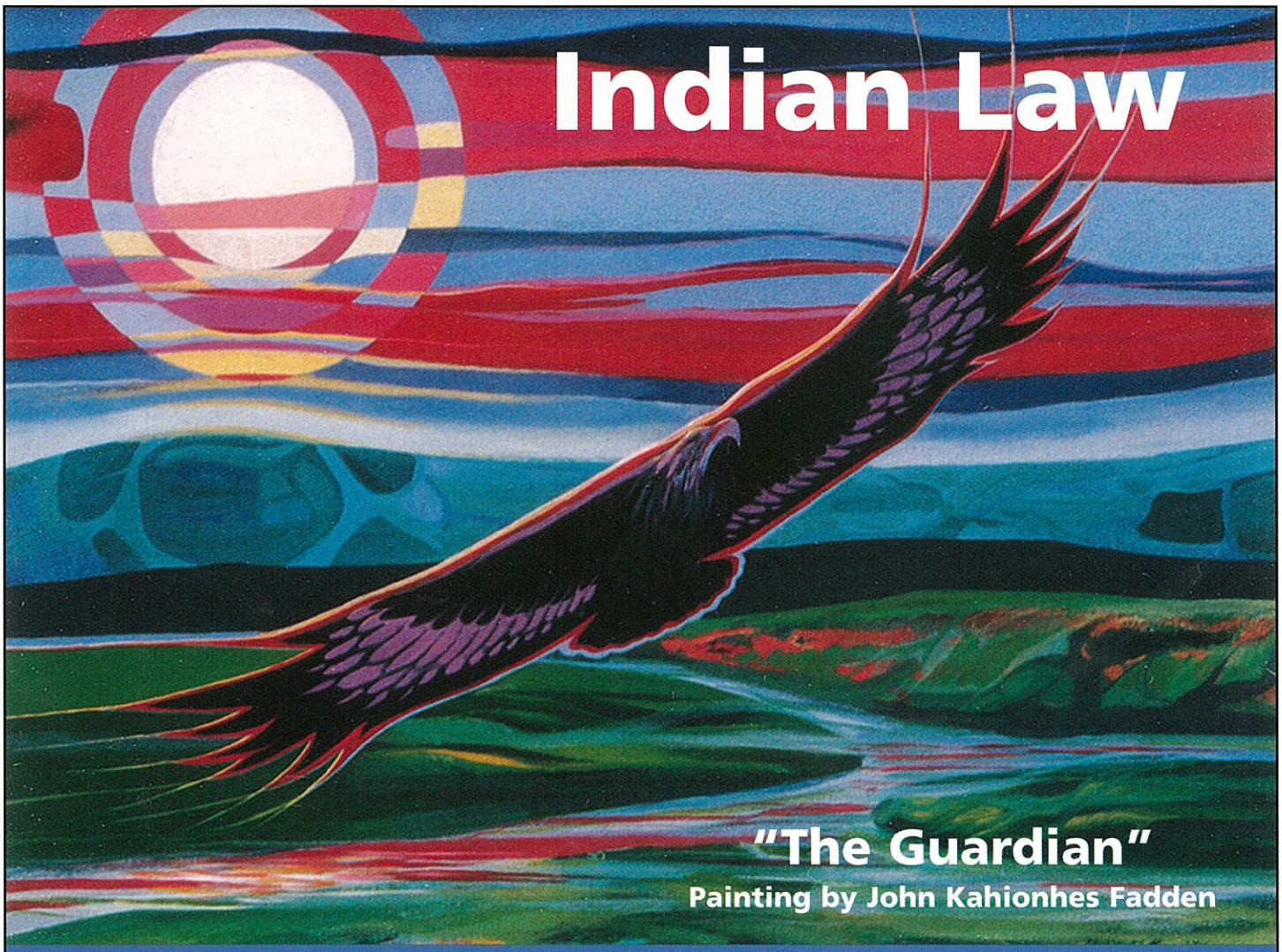
NYSBA SPRING 2006 | VOL. 8 | NO. 1

Government, Law and Policy Journal

A Publication of the New York State Bar Association
Committee on Attorneys in Public Service, produced in cooperation with the
Government Law Center at Albany Law School



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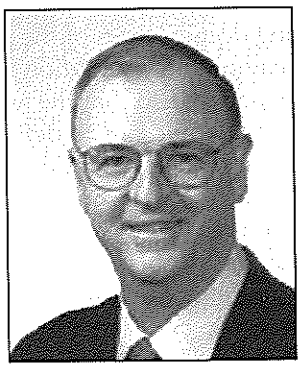
The Indian Child Welfare Act Implementation in New York

By Frederick J. Magovern



There are some 76,500 Native Americans residing in New York State according to the 2000 US Census. They belong to seven federally recognized tribes and two New York State recognized tribes: the Cayuga Nation of Indians, the Tuscarora Nation, the St. Regis Mohawk Tribe, the Oneida Indian Nation, the Seneca Nation of Indians, the Onondaga Nation, Tonawanda Band of Senecas, the Unkechauga Nation, and the Shinnecock Tribe. The Indian battles lately fought in New York have been for the most part confined to litigation over land claims[1] and gambling.[2] However, as important and financially significant as such issues may be to the tribes, nothing elicits as visceral a response from the tribes of Native Americans as does a challenge to the custody of their children. The answers to such vexing issues are controlled in New York, as well as elsewhere, by the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 *et seq.*[3]

The ICWA "was the product of rising concern in the mid-1970s over the consequences to [American Indian and Alaska Native] children, [American and Alaska Native] families, and [American Indian and Alaska Native] tribes of abusive child welfare practices that resulted in the separation of large numbers of American Indian and Alaska Native children from their families and tribes through adoption and foster care placement, usually in non-Indian homes."[4] Congressional hearings revealed that "25 to 35% of all [American Indian and Alaska Native] children had been separated from their families and placed in adoptive families, foster care, or institutions."[5] New York reported that 97% of the Native American children were placed in non-Indian foster homes.[6] Not surprisingly, Congress found that the high rate of placement in non-Indian homes was not in the best interests of Native Americans and enacted the ICWA, noting that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[7]

The stated policy of the ICWA is to establish federal criteria for the removal and placement of Indian children and to give assistance to the various Indian Nations in maintaining their culture and native identity and in their operation of family and child welfare programs:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[8]

The major provisions of the ICWA:

- give the tribe exclusive jurisdiction for child welfare proceedings over reservation-domiciled Native Americans;[9]
- require that state courts notify the interested tribe of any involuntary placement proceedings involving an Indian child;[10]
- require that, absent parental objection or good cause to the contrary, state court proceedings are to be transferred to tribal courts;[11]
- allow the tribe intervention as of right in state court foster care and termination of parental rights proceedings;[12]
- impose placement preferences that govern state foster care, pre-adoptive, and adoptive placements of Indian children;[13]
- fix minimum evidentiary standards and procedures for state court foster care placement and termination of parental rights proceedings;[14]
- establish Federal standards for voluntary foster care placements, surrenders or termination of parental rights, and adoptive placements;[15]
- require full faith and credit be accorded tribal public acts, records, and judicial proceedings in state court proceedings.[16]

Application of the ICWA provisions virtually dictate the course of state termination of parental rights proceedings, foster care and adoption placements. Of no lesser significance are the provisions that require that the state provide remedial and rehabilitative services

before an Indian child may be removed from his or her family absent exigent circumstances.[17] Thus, in any court proceeding that concerns the custody[18] of an Indian child,[19] the presentment agency must first demonstrate to the court that reasonable efforts were made to prevent the placement.

New York State's Department of Social Services, along with the State's Department of Health and the Department of Education, are responsible for seeing that New York's specific obligations to its Native American population are fulfilled. Native American Services came under New York State's Office of Children and Family Services ("OCFS") when it was formed in January 1998. OCFS's Native American Services (formerly known as the Bureau of Indian Affairs) responds to the needs of Indian Nations and their members both on and off the reservations. OCFS provides assistance to both the local social service districts as well as to authorized child care agencies.

A court's determination that state intervention is appropriate and that placement of the Indian child is necessary is just the beginning of the inquiry. The court must follow the specific Foster Care Placement Preferences.[20] The preferences differ somewhat depending upon the nature of the custody proceeding. However, the clear goal is for the Indian child not to lose his or her Indian cultural heritage. The first preference, therefore, is that the Indian child be placed with a member of the child's extended family. If no suitable extended family member is available, the second preference is for the child to be placed with a foster home approved or specified by the Indian child's tribe. If there is no available tribal home, the third preference is for the child to be placed with an Indian foster home certified by the agency. Deviation from the preferences is permissible only if there is a showing of good cause. The ICWA does not specify what constitutes good cause.

In the case of an Indian child being placed for adoption, the authorized child care agency arranging for the adoption must follow the Adoption Placement Preferences.[21] Again, the first adoption preference is for placement with a member of the child's extended family. If there is no extended family member is available, then the preference is for the child to be placed with other members of the child's Indian tribe. In the event no family members or tribal members are available, then the preference is for placement with another Native American family. Only after exhausting the preferences (or upon a showing of good cause to deviate from the preferences) may the Indian child be placed in a non-Indian home for adoption.

The ICWA's purpose is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families."[22] The guiding case is *Mississippi Band of Choctaw Indians v Holyfield*.[23] The Supreme Court has not entertained another ICWA case since *Holyfield*. The issue in *Holyfield* was whether two Indian parents who were residents and domiciliaries of a reservation could defeat the ICWA provisions granting exclusive jurisdiction over adoption proceedings involving domiciliaries of the reservation to tribal courts by leaving the reservation to give birth to their child.[24] The majority held that the jurisdictional requirements of the ICWA could not be defeated simply by temporarily leaving the reservation. The Supreme Court stated that the ICWA was concerned with, *inter alia*, "the interests of Indian children and families" and the placement of such children "outside their culture."[25] The Court noted that the tribe's interest at issue extended only to the "relationship between Indian tribes and Indian children domiciled on the reservation."[26] Thus, the Supreme Court in *Holyfield* limited its holding to cases involving domiciliaries of a reservation, and indicated that the ICWA was directed at existing Indian families and the placement of children from those families outside existing Indian culture. *Holyfield* is relied on by both proponents of the ICWA and those who would limit its application.

Congress also intended for the various state courts to determine when the ICWA should apply to a particular case.[27] New York's experience with the ICWA as reflected in reported decisions has been limited. The New York County Family Court in *In re the Adoption of Christopher*[28] avoided wrestling with the ICWA issues by determining that the ICWA did not apply because the tribe was not a federally recognized tribe. A year later the Fourth Department, in *In re Philip Jaye J., Jr.*,[29] similarly found that the ICWA did not apply because there had been no proof that the child was an Indian child. However, in *Baby Girl S.*[30] there was no way for the Westchester Surrogate's Court to avoid the ICWA issue in the contested private placement adoption proceeding.

The birth mother *In Baby Girl S.* was 13/32 Chickasaw Indian and living in Oklahoma.[31] Neither the birth mother nor her husband resided on a reservation. The birth mother claimed that Baby Girl S. was fathered by a non-Indian male. Four days after the child was born both the mother and her husband gave judicial consent to this child's private placement adoption. Shortly thereafter the adoptive parents returned to their home in New York with the child to finalize the adoption. The adoptive parents notified the Chickasaw Nation of the mother's choice to give the child up for adoption and filed for the adoption in the Westchester County Surrogate's Court. The non-Indian birth father contested the adoption and the Chickasaw Nation moved to intervene in the proceedings. Both the birth mother and her husband supported the adoption throughout the proceedings. The threshold issue that the Surrogate had to

determine was whether the ICWA applied to the private placement adoption.[32]

The Surrogate Court gave a thorough review of the policy and legislative history of the ICWA.[33] It determined that the ICWA was not intended to apply in circumstances where the Indian parent did not live on the reservation; conceived the child with a non-Indian father; had voluntarily consented to the adoption; had relinquished the child at birth so that it lived with the adoptive parents throughout the proceedings; objected to the tribe's intervention; and had no demonstrated connection to the tribe or the "Indian way of life."[34] The court noted too that the Indian birth mother did not want her child adopted by any tribal member and wanted the child to be raised in the "larger community" provided by the adoptive parents who would educate the child as to her heritage. The Surrogate concluded under such circumstances that application of the ICWA would neither further the ICWA's policies nor serve the child's best interests.[35]

In so ruling the Surrogate aligned New York with a minority of other states—California with the largest Native American population prominent among them—that recognized the Existing Indian Family ("EIF") doctrine as a necessary exception to the ICWA to maintain its constitutionality. The EIF doctrine holds that the ICWA cannot legally be applied to voluntary adoption proceedings where neither parent nor the child has significant social, cultural, or political ties with the Indian tribe.[36] The central justification of the EIF is that Congress did not intend to dictate that children of Indian blood who had never been a member of an Indian home or culture, and probably would never be, must be removed from their primary culture and placed in an Indian environment over their parents' objection. The "underlying thread" running throughout the ICWA is concern with the removal of Indian children from an existing Indian family unit and the resulting breakup of that existing Indian family.[37] The Surrogate in *Baby Girl S.* found nothing in *Holyfield* inconsistent with the rationale behind the EIF.[38] No appeal was taken.

At present, 14 states have rejected the EIF exception to the ICWA while 7 jurisdictions have adopted it.[39] Several courts in other states have adopted the EIF exception to the ICWA where there is no existing Indian family from which the adoptive child is being removed.[40] The courts of the states that have rejected the EIF exception do so relying on the Supreme Court case *Mississippi Band of Choctaw Indians v. Holyfield*,[41] which they contend implicitly precludes the EIF doctrine.[42]

This issue was recently re-visited, this time by the Family Court of New York County, in *In re Baby Boy C.*[43] Once again, an Indian birth mother, who did not reside on a reservation and who was not a domiciliary of the reservation, and the non-Indian birth father arranged privately for the placement of their child with a New York couple for adoption. The tribe sought to intervene under both the ICWA and pursuant to CPLR 1013 (permissive intervention), which the adoptive parents opposed. The Family Court found that the birth mother had rejected her Indian heritage and that the child was not a member of an existing Indian family that the ICWA was enacted to protect.[44] Nevertheless, the Family Court allowed the tribe to intervene pursuant to CPLR 1013.[45] The adoption was subsequently found to be in the child's best interests. The tribe appealed.

The Appellate Division First Department became the first appellate court in New York to consider the ICWA and the EIF exception. The Appellate Division reversed,[46] finding that while Baby Boy C was an 'Indian child' within the meaning of the ICWA, the tribe had no right to intervene under the ICWA because the ICWA "does not provide for tribal intervention in [private placement] adoption proceedings as a matter of right."[47] As a practical matter, this appears to be a distinction without a difference since the court proceeded to find that the ICWA was clearly implicated in the adoption proceeding and the tribe was allowed to intervene as an interested party under CPLR 1013.[48] The Appellate Division remanded the adoption proceedings to the Family Court for further hearings on the issue of whether good cause existed to deviate from the ICWA adoption placement preferences. The case is *sub judice*.

The Appellate Division in *Baby Boy C.* soundly rejected the EIF doctrine's application in New York and reinforced the statutory mandate that the ICWA is implicated in every adoption case in which an Indian child is involved.[49] Proponents of the EIF will find the Appellate Division's dismissal of the notion that the ICWA is unconstitutional absent the EIF doctrine troublesome. The Appellate Division rejected the Family Court holding that the EIF doctrine was necessary for the ICWA to avoid constitutional infirmity and found that the Family Court applied the wrong standard of assessing the constitutionality of the statute.[50] The unanimous court held that since the adoptive parents had no constitutional right to adopt Baby Boy C. despite his having lived with them since his birth, they had no fundamental liberty interest at stake, and therefore then the ICWA's consitutionality must be evalutated under the rational basis test rather than the strict scrutiny test. The court went on to say:

> Having concluded that no fundamental right or suspect classification is implicated by the application of ICWA in this case, petitioners' constitutional claims are properly evaluated under the rational

> basis test. Applying that test, we agree with those courts that have held that ICWA is rationally related to the protection and preservation of Indian tribes and families and to the fulfillment of Congress's unique guardianship obligation toward Indians.[51]

Child rights advocates will no doubt be troubled by this decision in that it squarely rejected California's child friendly *Bridget R.* decision, where that court found that Bridget R. did indeed have a constitutionally protected right, a liberty interest, in being raised by her *de facto* parents who loved and cherished her and who were committed to adopting her. Here too, the *Baby Boy C.* decision is largely dimissive of the parental perogatives of the birth parents[52] other than to note that a parent's adoption preference is a consideration for deviating from the ICWA adoption preferences. This decision clearly signals that the child's best interests are subordinate to the continued existence of the tribe.

In reaching the conclusion that there is no fundamental right to adopt or be adopted, the Appellate Division relied upon the 11th Circuit Court of Appeals decision *Lofton v. Secretary of Dept. of Children & Family Servs.*[53] *Lofton* concerned Florida's foster care and adoption program, which prohibited same sex foster parents from adopting their foster child. The foster parents challenged this scheme claiming, *inter alia*, that they had a constitutional right to adopt their foster child who had been placed in their care by the state of Florida. The 11th Circuit upheld Florida's right to choose who can adopt its foster child and further held that the foster parents had no constitutional right to adopt.[54] *Baby Boy C.*, however, did not involve New York's foster care program.

The Appellate Division did not consider the United States Court of Appeals for the Second Circuit decision in *Rivera v. Marcus.*[55] *Rivera* involved the removal of two siblings by the Connecticut Welfare Department after being in foster care provided by their half-sister pursuant to a foster care contract. The Second Circuit found that there was a liberty interest deserving of constitutional recognition. The court noted that "the courts have long recognized that children possess certain liberty rights and are entitled to due process protection of these rights."[56] The court went on to state that in making decisions that would upset a long-standing familial relationship, a court must protect a child's due process right in maintaining such a relationship:

> If the liberty interest of children is to be firmly recognized in the law, we must ensure that due process is afforded in situations like that presented here where the state seeks to terminate a child's long-standing familial relationship.[57]

The Appellate Division in *Baby Boy C.* said that the major flaw with states that accepted the EIF exception was the failure to give adequate consideration to the ICWA "good cause" exceptions,[58] which allow state courts to depart from the placement preferences upon a showing of good cause. The court noted that application of the preferences was not mandatory or automatic. These preferences, according to the court, give state courts the flexibility to deviate from the preferences where the best interests of the parent or child outweigh the tribe's interest in the strict application of those preferences.[59] Although good cause is not spelled out in the ICWA, the Appellate Division found that the Bureau of Indian Affairs' (BIA) guidelines could be relied upon for guidance. The BIA guidelines provide that "good cause" to deviate from the preferences could be based upon the birth parents' request,[60] extraordinary needs of the child as proven by expert testimony, and the unavailability of suitable Indian families for placement.[61] Thus, the Appellate Division posited that the Family Court below might well have reached the same result of allowing the adoption placement without the need invoke the EIF doctrine and precluding the tribe from participating:

> Here, had the Family Court found ICWA applicable and held a placement preference/good cause hearing, it may well have reached the same result of permitting the adoption to proceed without having to rely on a judicially created exception to ICWA that is inconsistent with its language and purpose.[62]

The ICWA serves an important purpose in attempting to preserve the cultural heritage of Indian children. Unfortunately, there are situations where pursuit of this laudable goal can come into conflict with other arguably equally important interests. The aforementioned case law on the ICWA clearly demonstrates the tension between the rights of Indian Tribes and the rights of birth parents of Indian children who are willing to allow and perhaps explicitly want would-be non-Indian parents to adopt their children. Some courts have attempted to resolve this underlying issue by adopting an "Existing Indian Family" exception while other courts, such as the First Department of New York in *Baby Boy C.*, find no basis for this judicially created exception, instead relying on the "good cause" provisions to the ICWA.

The Appellate Division decision in *Baby Boy C.*, while not as of yet final, certainly should be reassuring to the tribes of New York that the ICWA will be enforced in New York. However, decisions such as *Baby Boy C.* also arguably show that the ICWA as applied does not give sufficient weight to the rights of both the birth parents of an Indian child and those seeking to adopt.

Endnotes

1. *Sherrill v. Oneida Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478 (2005) (Oneidas could not "unilaterally reassert sovereign control and remove these parcels from the local tax rolls." *Id.* at 1493).
2. *Dalton v. Pataki*, 5 N.Y.3d 243, 802 N.Y.S.2d 72 (2005) (holding that federal Indian Gaming Regulatory Act preempts state law).
3. New York statutes and regulations incorporate the ICWA mandates. *See, e.g.*, N.Y. Domestic Relations Law § 75-c; N.Y. Social Services Law §§ 2 (35 & 36), 39; N.Y. Family Court Act 115(d); Uniform Civil Rules for Supreme and County Court 202.68; Uniform Rules for the Family Court 205.51; Uniform Rules for the Surrogate's Court 207.59.
4. *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 32 (1989).
5. *Id.*
6. *Hearing on S.1214 before the Select Committee on Indian Affairs*, U.S. Senate, 95th Cong. 539 (1977).
7. 25 U.S.C. § 1901(3).
8. 25 U.S.C. § 1902.
9. 25 U.S.C. § 1911(a).
10. 25 U.S.C. § 1912(a).
11. 25 U.S.C. § 1911(b).
12. 25 U.S.C. § 1911(c).
13. 25 U.S.C. § 1915(c).
14. 25 U.S.C. § 1912(e)-(f).
15. 25 U.S.C. § 1915.
16. 25 U.S.C. § 1911(d).
17. 25 U.S.C. §§ 1912(d), 1922.
18. The ICWA is not implicated in matrimonial proceedings.
19. *See, e.g.*, N.Y. Social Services Law §§ 358-a, 384-b (voluntary placement proceedings and guardianship proceedings, respectively); N.Y. Family Court Act art. 10 (FCA) (neglect and abuse proceedings); N.Y. FCA arts. 3, 7 (Juvenile delinquency and PINS [Persons In Need of Supervision] proceedings, respectively).
20. N.Y. Comp. Codes R. & Regs. tit. 18, § 431.18(f)(1) (N.Y.C.R.R.).
21. 18 N.Y.C.R.R. § 431.18(g)(1).
22. 25 U.S.C. § 1902.
23. 490 U.S. 30 (1989).
24. *Holyfield*, 490 U.S. 32-54.
25. *Id.* at 49-50.
26. *See id.* at 52, *quoting*, *In re Adoption of Halloway*, 732 P. 2d 962, 969-70 (Utah 1986).
27. *Kiowa Tribe of Oklahoma v Lewis*, 777 F.2d 587, 591 (10th Cir. 1985) (refusing to review a state court's determination that ICWA did not apply under *res judicata* and full faith and credit principles).
28. 73 Misc. 2d 851, 662 N.Y.S.2d 366 (Fam. Ct., New York Co. 1997).
29. 256 A.D.2d 1201, 684 N.Y.S.2d 94 (4th Dep't 1998).
30. 181 Misc. 2d 117, 125, 690 N.Y.S. 2d 907 (Surr. Ct., Westchester. Co. 1999).
31. *Id.* at 119.
32. *Id.* at 120-21.
33. *Id.* at 121-25.
34. *Id.* at 125.
35. *Id.* at 126.
36. *See id.* at 122.
37. *In re Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982).
38. *In re Baby Girl S.*, 181 Misc. 2d 117, 125, 690 N.Y.S.2d 907 (Surr. Ct., Westchester Co. 1999).
39. *See In re Baby Boy C.*, 27 A.D.3d 34, 46 n.4, 805 N.Y.S.2d 313, 322 n.4 (1st Dep't 2005) (surveying various states' treatment of the EIF exception to the ICWA).
40. *See In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (Cal. Ct. App., 2d Dist. 2001) (California); *In re Crystal R.*, 59 Cal. Rptr. 4th 703, 69 Cal. Rptr. 2d 414 (Cal. Ct. App., 6th Dist. 1998) (California); *In re Bridget R.*, 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (Cal. Ct. App., 2d Dist. 1996) (California); *In re Alexandria Y.*, 45 Cal. App. 4th 1483, 53 Cal. Rptr. 2d 679 (Cal. Ct. App., 4th Dist. 1996) (California); *In the Interest of D.C.C.*, 971 S.W.2d 843 (Mo. Ct. App. 1998) (Missouri); *S.A. v E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990) (Alabama); *Rye v. Weasel*, 934 S.W.2d 257 (Kent. 1996) (Kentucky); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995) (Louisiana); *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988) (Indiana); *In re Crews*, 825 P.2d 305 (Wash. 1992) (Washington); *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997) (Tennessee).
41. 490 U.S. 30 (1989).
42. *See, e.g.*, *In re Elliott*, 554 N.W.2d 32, 36 (Mich. Ct. App. 1996).
43. 5 Misc. 3d 377, 784 N.Y.S.2d 334 (Fam. Ct., New York Co. 2004).
44. *Id.* at 379-80.
45. *Id.* at 386.
46. *In re Baby Boy C.*, 27 A.D.3d 34, 36, 58, 805 N.Y.S.2d 313, 314, 331 (1st Dep't 2005).
47. *Baby Boy C.*, 27 A.D.3d at 55-56, 805 N.Y.S.2d at 329.
48. *Id.*
49. *Id.* at 36, 55-56, 805 N.Y.S.2d. 318-19, 322-23.
50. *Id.* at 49-52, 805 N.Y.S.2d. 326-27.
51. *Id.* at 52, 805 N.Y.S.2d. 326 (citations omitted).
52. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (stating that "the interests of parents in the care, custody and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court").
53. 58 F.3d 804 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).
54. *Id.* at 827.
55. 696 F.2d 1016 (2d Cir. 1982).
56. *Rivera*, 696 F.2d at 1026, *citing Parham v J. R.*, 442 U.S. 584, 596-97 (1979) ("the . . . children [in this case] surely possess a liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth." *Id.*).
57. *Id.*
58. 25 U.S.C. § 1915.
59. *In re Baby Boy C.*, 27 A.D.3d 34, 52-53, 805 N.Y.S.2d 313, 327 (1st Dep't 2005), *citing*, *In re Alicia S.*, 65 Cal. App. 4th 79, 89 (Cal. Ct. App., 5th Dist. 1998).
60. While not noted in the decision, the birth parents conditioned the adoption upon their child being raised in the Jewish religion. Religious preferences might also be considered good cause to deviate from the preference.
61. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg. 67,584, 67,594 F.3 (Nov. 26, 1979).
62. *In re Baby Boy C.*, 27 A.D.3d at 53, 805 N.Y.S.2d at 327 (citation omitted).

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